

Lustration in Ukraine: Political Cleansing or a Tool of Revenge?

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History is in the making in Ukraine. Since December 2013 Ukraine lived through a revolution, occupation of a part of its territory, anti-terrorist military campaign, economic turmoil and a socio-political crisis. The government of Ukraine assumes that corrupt and disloyal political elites are to be at least partially blamed for the situation in this Eastern European state. According to the authorities some of those who were instrumental supporters of the previous non-democratic regime are still occupying certain positions in the country's administration.

To tackle corruption and disloyalty the government has proposed the [law on government cleansing](#) which is also known as the lustration law. This draft law has recently been examined by the Venice Commission resulting in the [opinion adopted on 20 June 2015](#). Despite the opinion been quite critical the Ukrainian government was quick to [announce](#) that the Venice Commission has confirmed that the law in question does not violate any international human rights standards or any of the resolutions of the Council of Europe. The announcement also states that the Venice Commission suggested some technical amendments to the draft law which will be taken into account by the Ukrainian authorities. This statement however does not really reflect what the Venice Commission has observed in its opinion.

The Commission has confirmed that lustration in principle does not violate any European or international human rights standard. This perhaps led the Ukrainian government to conclude that the Venice Commission has confirmed that the law in question is compatible with these standards. However, while lustration *per se* is not a violation of these standards it can easily be regarded as such if certain limits are overstepped and certain safeguards are not implemented. It can be compared with wiretapping which is legal under certain conditions within the criminal justice system but it can become a major human rights violation if it is abused which is quite possible.

In this post I will try to briefly outline the law under review. Then I will describe the key objections of the Venice commission which are in my view very substantial and cannot be qualified as mere technical suggestions. Finally, I will give some preliminary thoughts about the necessity of lustration in Ukraine.

The Lustration Law and the Venice Commission's Objections

The lustration law states that those officials who were a part of the previous regime are assumed not to be loyal to the new government of Ukraine and should be banned from holding a broad range of official positions for the period of time between 5 and 10 years. One can however earn the trust of the new government by participating in the counterterrorist operation in the Donetsk and Lugansk regions. In this case the ban will be lifted. This law also aims to combat corruption by disqualifying from taking many official posts those who have some irregularities and discrepancies between the property that has been declared to the fiscal authorities and the value of the property in reality. These irregularities will lead to 10 years of disqualification. The list of official positions mentioned in this law is very broad and therefore lustration will affect many thousands of civil servants, judges, policemen and military personnel. Moreover, lustration will not only apply to those who currently occupy the positions or those who will be appointed in the future, it will also be used to stop candidates from even applying for such positions (Art2(12)).

The Venice Commission has first disagreed that it is a good idea to combine lustration and anti-corruption legislation. While seemingly connected in the context of Ukraine these two phenomena warrant different approaches. Moreover, corruption has to be dealt with mostly by criminal law with all those safeguards that ensure fairness of a criminal trial. The lustration law offers shortcuts that simplify and speed up the fight against corruption but more significantly it may open a floodgate of arbitrary decisions and provide a tool for political

revenge.

There are a few significant issues which were highlighted by the Venice Commission. The Law does not only affect those who occupied a position during the ruling of president Yanukovych but also those who 'occupied high positions in the Communist Party or Komsomol during the Soviet period or worked as employees or covert agents of the KGB in that period'. Lustration of something that was happening more than 25 years ago can hardly be justified. It is an arguable issue of whether Ukraine should have had a lustration law in the 1990s but it is unlikely that such lustration can be justified now. Time is an important factor in considering whether a lustration procedure is in compliance with the human rights standards.

The Lustration Law introduces a very harsh sanction that can affect the livelihood of the people concerned. The system of administration of lustration will be decentralised and therefore it can produce significantly different result in different parts of the country. Such approach is highly problematic from the point of view of the rule of law and legal certainty.

The lustration law creates a system in which the culpability of a particular individual does not play any role and disqualification applies automatically as soon as it is established that a particular individual has occupied certain positions for a certain period of time (1 year) during the Yanukovych government. This provision creates a number of substantive difficulties. First, there is no way to prove that a target of lustration did not partake in crimes of the previous regime. The presumption of lack of loyalty is irrebuttable. Second, national courts cannot conclude that the person is not guilty of any wrongdoings; access to court is limited to establishing the fact of occupying a certain position. In other words, a minister of interior can challenge the fact that he was a minister for a year during the relevant period but cannot challenge his or her guilt of doing anything wrong. Second, a civil servant has to be in office for a year to be disqualified. This period is arbitrary because one can be very effective in organising criminal activities in less than a year; the opposite is also true: someone who was in power for more than a year can be totally clean and innocent.

Another problematic area of the lustration law that was highlighted by the Venice Commission is its application to judges. Judges are special here because they are subject to two regimes of cleansing. The government has already introduced the law on the restoration of trust in the judiciary. The Council of Europe has [assessed its compliance](#) with the human rights standards and emphasised a number of challenging issues. Independent judiciary is a cornerstone of an effective democracy. Having said that, the pressure on judges from the government should not be excessive. Lustration cannot act as a punishment for judicial decisions. Cleansing of the Ukrainian judicial system should be done through the normal routes of criminal law.

Finally, it seems that the Venice Commission implies that lustration is not a golden solution for the key systemic problems within the Ukrainian legal and political system. Only structural reforms can safeguard democracy and combat the pre-conditions for corruption. It seems that democracy cannot be built by violating rights and the lustration law might create fertile conditions just for that.

The discussion of whether Ukraine needs lustration goes well beyond the opinion of the Venice Commission. The members of the Commission have diplomatically relinquished this political decision to the Ukrainian authorities. But this blog post can be less diplomatic. Of course, Ukraine is not the first state in Europe introducing lustration. Some Eastern and Central European states went through lustration after the fall of communism. Suitability of many of those lustration laws were considered by the European Court of Human Rights and unsurprisingly the Court found some of them in violation of the European Convention on Human Rights. This is so because these laws deeply interfere with the life of the affected persons and the safeguards cannot always prevent excessive interferences. Lustration goes beyond the criminal justice system. It is supposed to quickly heal the legal system in the circumstances of transition. It is a paracriminal procedure which has to be applied very carefully as it may be perceived as a tool of suppressing democracy not enhancing one.

Perhaps some lustration that would focus on the highest governmental offices is justifiable. Having said that, lustration which is combined with the anti-corruption legislation and can be applied to a wide range of civil servants might throw the country into a long period of instability, political revenge and human rights violations.

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